Filed 2/4/14 P. v. Wettengel CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DESTINIE MARIE WETTENGEL, Defendant and Appellant.	A139340 (Del Norte County Super. Ct. No. CRF139449)

I.

INTRODUCTION

Appellant Destinie Marie Wettengel appeals from a portion of her sentence following her guilty plea to one felony count of resisting an executive officer (Pen. Code,[1] § 69). The sole issue raised on appeal is her contention that the trial court erroneously imposed a $200[2] fee for the preparation of a presentence probation report without making a finding that appellant had the ability to pay the fee. Alternatively, appellant contends that if this court deems she forfeited any objection to the fee because no objection was made by her counsel at sentencing, then she was provided ineffective assistance of counsel. We reject both arguments and affirm the judgment, including the

[1] All further undesignated statutory references are to the Penal Code, unless otherwise indicated.

[2] The court's minutes indicate that the fee imposed for the probation report was $400, although the court ordered in open court that this fine be reduced to $200 because of appellant's indigency.

imposition of a $200 probation report preparation fee imposed under section 1203.1b, subdivision (a).

II.

FACTUAL AND PROCEDURAL BACKGROUNDS

A five-count criminal complaint was filed by the Del Norte County District Attorney's Office on June 6, 2013,[3] alleging that appellant committed assault with a deadly weapon (§ 245, subd. (a)(1)), felony battery upon an officer with injury (§ 243, subd. (c)), felony resisting an executive officer (§ 69), misdemeanor battery upon a spouse or cohabitant (§ 243, subd. (e)(1)), and misdemeanor child endangerment (§ 273a, subd. (b)). Appellant entered pleas of not guilty at her initial arraignment.

The facts underlying the allegations in the complaint are summarized from the presentence probation report:

Law enforcement officers were dispatched to appellant's home in the early morning hours of June 5 based on a report of a domestic disturbance. Upon arrival they heard yelling and banging coming from the interior of the residence. The officers saw appellant's sister, Deborah Wettengel (Deborah), and Steven Wettengel (Steven) engaged in an argument in the presence of appellant and three children ages 4, 6, and 7 years old.

After seeing Deborah strike Steven with a closed fist, officers entered the residence through the unlocked front door. They then separated the couple, but Deborah pulled away from the officer, kicking him and swinging her elbows and fists. Appellant yelled at the officer to let Deborah go, and began pulling on Deborah. The officer aimed his canister of pepper spray at appellant, who backed away, hitting Steven as she did so. Appellant then picked up an ottoman, raising it over her head, and charged at the officer. She backed away once again when the officer aimed his pepper spray at her.

Steven had retreated into an adjoining room, and appellant forced her way into that room. Hearing a scuffle and cry for help from Steven, an officer kicked in the now-locked door to the adjoining room. Appellant was placed in handcuffs and put into a

[3] All further calendar references are to the year 2013, unless otherwise indicated.

patrol vehicle after a backup officer arrived. Deborah was also arrested and placed in a patrol car while she continued to resist the officer by kicking at him.

On June 25, the date set for the preliminary hearing, appellant entered into a plea bargain with the prosecution. She agreed to plead guilty to felony resisting an executive officer for which she would be sentenced to a maximum of three years, in return for dismissal of the remaining counts. A plea declaration was signed and initialed by appellant indicating her understanding of the rights she was relinquishing by entering the plea agreement, and her understanding that she could be sentenced to up to five years four months if she were found guilty on all counts. After appellant indicated she understood the rights she was giving up, the court accepted the plea and the matter was referred to the probation department for the preparation of a presentence report, with sentencing was set for July 11.

Because of a delay in the preparation of the presentence probation report, judgment and sentencing were continued to July 18. The report became available on July 11. As is pertinent here, it recommended that appellant be sentenced to the upper, aggravated term of three years for her plea to a violation of section 69, and that certain fees and penalties be imposed, including a $400 fee for preparation of the presentence probation report.

At the sentencing on July 18, the trial court decided to impose the midterm of two years imprisonment rather than the recommended three years. The court then ordered appellant to pay the fees and penalties recommended in the report including a $400 fee for preparation of the report by the probation department. In response, appellant's counsel stated: "Just to inform the court she's indigent so the bare minimum, please." The court then reduced the amount of the fee to $200.

III.

DISCUSSION

As noted, appellant claims the imposition of the probation report preparation fee of $200 was erroneously imposed under section 1203.1b, subdivision (a) because the court failed to determine that appellant had the ability to pay the fee.

Section 1203.1b, subdivision (a)[4] requires that a determination be made by the trial court as to a defendant's ability to pay certain probation-related expenses, regardless of whether probation is granted. This determination includes an interview by the probation department to determine a defendant's ability to pay in the first instance, and if requested, a hearing by the court to make the determination. The determinations set forth by the statute are waivable.

No determination of appellant's ability to pay the probation report preparation fee was made in this case, and no objection was made by appellant's counsel at the time the

[4] The full text of subdivision (a) of section 1203.1b is as follows: "(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

fee was imposed.[5] The question then becomes whether the right to demand a hearing was forfeited or waived by counsel's failure to demand such a hearing.

Our Supreme Court recently reviewed the law of forfeiture through failure to object at sentencing in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*). In that case, the issue was whether the failure to object to the imposition of a booking fee forfeited the right to challenge the sufficiency of the evidence supporting the defendant's ability to pay on appeal. (*Id*. at p. 591.) The high court concluded that such a claim was indeed forfeited by the defendant's failure to object on the ground that there was no evidence the defendant had the ability to pay the fine. In the course of its analysis, the court reviewed the recent development of the law dealing with sentencing forfeitures in general, including those relating to the conditions imposed incident to a grant of probation: "Our application of the forfeiture bar to sentencing matters is of recent vintage. In *People v. Welch* (1993) 5 Cal.4th 228 . . . (*Welch*), we held the defendant forfeited a challenge to the reasonableness of a probation condition because she failed to raise it when sentenced. In *People v. Scott* (1994) 9 Cal.4th 331, 354 . . . (*Scott*), we held the defendant forfeited a claim that the sentence imposed on him, 'though otherwise permitted by law, [was] imposed in a procedurally or factually flawed manner.' Both cases provided for only prospective application of the rules they announced because formerly such hearings were 'largely conducted under the assumption' that sentencing error claims, including challenges to probation terms, could 'be raised in the first instance on appeal.' (*Scott*, at p. 337; see *Welch*, at p. 238 ['existing law overwhelmingly said no . . . objection' to terms of probation 'was required' to preserve the issue for appeal].) *Welch* and *Scott* brought the forfeiture rule for alleged sentencing errors into line with other claims of trial court error, rather than placing such claims outside the general rules regarding forfeiture: unless a party makes a contemporaneous objection, he or she

[5] We reject summarily appellant's argument that her counsel's request that the court impose "the bare minimum" in fines because she was indigent constituted a request for an ability to pay hearing under section 1203.1b, subdivision (a).

generally cannot challenge a court's ruling for the first time on appeal. ([*In re*] *Sheena K.* [(2007)] 40 Cal.4th [875,] 880-881.)" (*McCullough, supra*, 56 Cal.4th at p. 594.)

Since *McCullough* was decided, its rationale has been extended to apply to waivers relating to probation fees imposed under section 1203.1b. (*People v. Aguilar* (2013) 219 Cal.App.4th 1094, review granted Nov. 26, 2013, S213571; see also *People v. Snow* (2013) 219 Cal.App.4th 1148 [failure to object waives challenges to imposition of probation report and supervision fees].) We find the reasoning of these cases persuasive. Thus, we reject appellant's contention that *McCullough* is distinguishable because the procedures applicable to imposition of probation-related fees are more "distinct" from those applicable to the booking fee statute. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*).)

In arguing that her right to an ability to pay hearing under section 1203.1b. subdivision (a) was not forfeited, she points out that she was never advised that she could request such a hearing. Because the waiver of an ability to pay hearing was not among the other admonishments referenced and waived in her plea declaration, appellant asserts that her statutory right to a hearing was not forfeited in the absence of a knowing and voluntary waiver. Appellant cites no authority in support of this proposition except *People v. Pacheco* (2010) 187 Cal.App.4th 1392; a case specifically disapproved by our Supreme Court in *McCullough.* (*McCullough, supra*, 56 Cal.4th at p. 599.)

Our Supreme Court has consistently "distinguished between unauthorized sentences—those that 'could not lawfully be imposed under any circumstances in the particular case' [citation]—and discretionary sentencing choices—those 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.' [Citation.] As to the former, lack of objection does not foreclose review: 'We deemed appellate intervention appropriate in these cases because the errors presented "pure questions of law" [citation] and were " 'clear and correctable' independent of any factual issues presented by the record at sentencing." [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.' [Citation.] With respect to the latter,

however, the general forfeiture doctrine applies and failure to timely object forfeits review. Such '[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.' [Citations.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

In *Valtakis, supra,* 105 Cal.App.4th 1066, the court concluded that imposition of a probation fee without a hearing or evidence of ability to pay did not result in an unauthorized sentence, "for a probation fee *could* have been lawfully imposed had an ability to pay appeared, a clearly fact–bound determination. 'In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' [citation], which is exactly the claim here: the probation fees, otherwise permitted, were procedurally flawed (for absence of notice, a hearing or a finding) and factually flawed (for absence of evidence that the defendant had the ability to pay). The unauthorized-sentence exception does not apply. [Citation.]" (*Id*. at p. 1072, original italics; see also *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

We agree with the *Valtakis* court's reasoning and follow it here. Moreover, to "allow a defendant and his counsel to stand silently by" as the court imposes a probation fee, and then contest it for the first time on an appeal, not only contravenes the objective of section 1203.1b and other recoupment statutes that " 'reflect a strong legislative policy in favor of shifting the costs stemming from criminal acts back to the convicted defendant' " and " ' " 'replenishing a county treasury from the pockets of those who have directly benefited from county expenditures,' " ' [citation]," but "would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay without an appeal anytime during the probationary period [citation] or the pendency of any judgment [citations]." (*Valtakis, supra,* 105 Cal.App.4th at pp. 1073, 1076; see § 1203.1b, subd. (c).)

Appellant alternatively argues that if her objection to the imposition of the probation report preparation fee was forfeited by the failure of her attorney to make the required objection, she then was denied the effective assistance of counsel.

In order to establish ineffective assistance of counsel on direct appeal, a criminal defendant must show both that his or her trial counsel's performance was not reasonably competent, and that there is a reasonable probability the result of the proceeding would have been different if trial counsel had not made the errors the defendant asserts. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) If the record on appeal fails to show why trial counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; accord, *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

Here, there is no showing why counsel failed to insist on a hearing to determine appellant's ability to pay the probation report preparation fee. Nor has appellate counsel shown that an explanation was asked from trial counsel and he or she failed to provide one, or that appellant has eliminated all satisfactory explanations for the omission. Although we can think of several, we are mindful of authority that cautions against such speculation. "If 'counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.' [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. To engage in such speculations would involve the reviewing court ' "in the perilous process of second-guessing." ' [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) Ineffective assistance of counsel cannot be predicated on counsel's reasonable, albeit unsuccessful, tactical choices. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1080-1082.)

We choose to follow the course suggested by our Supreme Court, and simply conclude appellant has failed in her burden to show ineffective assistance of counsel on appeal.

IV.

DISPOSITION

The judgment and sentence imposed, including the probation report preparation fee imposed under section 1203.1b, are affirmed.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

_____
HUMES, J.